KELANG PEMBENA KERETA2 SDN BHD

v.

MOK TAI DWAN

COURT OF APPEAL, KUALA LUMPUR
NH CHAN JCA
ABU MANSOR ALI JCA
HAIDAR MOHD NOOR JCA
[CIVIL APPEAL NO: J-02-791-1995]
22 DECEMBER 1999

LANDLORD AND TENANT: *Repairs effected by tenant - Whether landlord obliged to bear cost of repairs - Obligations of tenant and landlord - Construction of lease agreement*

LANDLORD AND TENANT: *Rent - Non-payment - Notice to remedy breach sent to tenant - Whether lawful to send copies of notice to sub-tenants*

The appellant, Kelang Pembina Kereta-Kereta Sdn Bhd ('KPKK'), leased industrial land and five blocks of building thereon to the respondent ('Mok') for a period of six years. Under cl 5(e) of the lease agreement dated 10 August 1989, Mok was allowed to sublease the property and he sublet the premises to several parties.

It was not disputed that the roof of the building was in bad condition upon commencement of the lease, and that Mok had been prepared to and did undertake repairs to it. However, it was subsequently discovered that the problem was a structural defect which could not be remedied and sections of the roof had to be replaced.

On 23 August 1993, KPKK's solicitors sent Mok a notice requiring him to remedy his breach with regard to non-payment of rent. Copies of the notice were sent to several of the sub-tenants. Mok argued that such action was wrong in law. KPKK subsequently entered into direct lease agreements with four of the sub-tenants ('the direct lease agreements').

Both KPKK and Mok paid for repairs to different parts of the roof and sought to claim the cost from each other.

The issues which arose for determination were: (i) whether the duty to pay for the replacement of the roof fell on KPKK or Mok, having regard to cl 4(g) and (k) which imposed on Mok, as tenant, the obligation to keep the premises in tenantable repair, fair wear and tear excepted, and to 'repair

and maintain the roof' of the premises; and (ii) whether KPKK had induced Mok's sub-tenants to breach their sub-tenancies with Mok, causing him loss.

The trial judge held that the duty to pay for the replacement of the roof laid on KPKK as the roof failure was due to structural defects and excessive corrosion which were not caused by Mok, and that the roof replacement was not within the contemplation of cl 4 of the lease agreement. The judge further held that KPKK had not induced the sub-tenants to breach their agreements with Mok.

Both KPKK and Mok appealed.

Held:
Per Haidar Mohd Noor JCA

[1] Whilst it is well established that in the absence of an agreement to the contrary, the law imposes no obligation on a landlord to keep the premises in repair, the issue of the roof here being beyond repair was clearly demonstrated by the facts.

[2] It was clear that the roof failure was caused by structural defects and corrosion. The trial judge was correct in his findings and had considered the correct factors such as the original state of the building, the cost of roof replacement, the enhanced value of the building after replacement compared to when the lease commenced, and the value of the lease in determining the dispute in the tenant's favour.

[3] The direct tenancy agreements were executed by KPKK after the termination of the lease between KPKK and Mok. Hence, the issue of KPKK inducing Mok's sub-tenants to breach their agreements with Mok did not arise.

[4] The serving of copies of the notice on the sub-tenants by KPKK did not contravene s. 235 of the National Land Code 1965 and did not amount to an actionable interference.

[Appeals dismissed with costs.]

***[Bahasa Malaysia** Translation Of Headnotes]*

Perayu, Kelang Pembina Kereta-Kereta Sdn Bhd ('KPKK'), telah memajak (leased) tanah perindustrian dan lima blok bangunan di atasnya kepada responden ('Mok') untuk satu tempoh selama enam tahun. Di bawah fasal 5(e) perjanjian pajakan bertarikh 10 Ogos 1989, Mok dibenarkan untuk memajak kecil (sublease) hartanah berkenaan dan beliau memajak kecil premis tersebut kepada beberapa pihak.

Ianya adalah tidak dipertikaikan bahawa bumbung bangunan tersebut berada dalam keadaan yang buruk ketika permulaan pajakan berkenaan, dan bahawa Mok telah bersedia untuk melakukan dan telahpun melakukan kerja-kerja pembaikan terhadapnya. Walaubagaimanapun, ianya telah kemudiannya didapati bahawa masalahnya merupakan suatu kecacatan (kerosakan) struktur yang tidak dapat diperbetulkan dan beberapa bahagian bumbung perlu digantikan.

Pada 23 Ogos 1993, peguamcara KPKK telah menghantar Mok sebuah notis yang menghendakinya untuk memulihkan kemungkirannya berhubung dengan ketak-bayaran sewa. Salinan-salinan notis berkenaan telah dihantar kepada beberapa daripada penyewa-penyewa kecil di situ. Mok telah menghujah bahawa tindakan sedemikian adalah salah di sisi undang-undang. KPKK kemudiannya memasuki perjanjian-perjanjian pajakan langsung dengan empat daripada penyewa-penyewa kecil tersebut ('perjanjian-perjanjian pajakan langsung').

Kedua-dua KPKK dan Mok telah membayar untuk memperbaiki bahagian-bahagian bumbung yang berlainan dan cuba menuntut kos daripada satu sama lain.

Isu-isu yang timbul bagi penentuan adalah: (i) mengenai sama ada kewajipan untuk membayar bagi penggantian bumbung terletak pada KPKK ataupun Mok, dengan berpandukan fasal 4(g) dan (k) yang mewajibkan Mok, selaku penyewa, untuk menyimpan premis tersebut dalam keadaan baik yang boleh disewa, rosak rosot biasa dikecualikan, dan untuk 'repair and maintain the roof' (memperbaiki dan menyelenggara bumbung) premis tersebut; dan (ii) sama ada KPKK telah mendorong penyewa-penyewa kecil Mok untuk memungkiri penyewaan-penyewaan kecil mereka dengan Mok, yang mengakibatkannya untuk mengalami kerugian.

Tuan hakim perbicaraan telah memutuskan bahawa kewajipan untuk membayar bagi penggantian bumbung terletak pada KPKK kerana kerosakan pada bumbung telah diakibatkan oleh kecacatan struktur dan kakisan berlebihan yang bukannya disebabkan oleh Mok, dan penggantian bumbung tidak termaktub dalam fasal 4 perjanjian pajakan tersebut. Tuan hakim

selanjutnya memutuskan bahawa KPKK tidak mendorong penyewa-penyewa kecil untuk memungkiri perjanjian-perjanjian mereka dengan Mok.

Kedua-dua KPKK dan Mok telah membuat rayuan.

Diputuskan:
Oleh Haidar Mohd Noor HMR

[1] Meskipun ianya adalah jelas diterima bahawa dalam ketiadaan perjanjian yang menyatakan di sebaliknya, tidak ada sebarang kewajipan yang dikenakan oleh undang-undang terhadap seseorang tuantanah untuk menyimpan premis berkenaan dalam keadaan yang baik, namun di sini isu bumbung yang tidak dapat diperbaiki jelas sekali diperlihatkan dengan sokongan fakta-fakta.

[2] Ianya adalah jelas bahawa kerosakan bumbung telah diakibatkan oleh kecacatan struktur dan kakisan. Tuan hakim perbicaraan telah betul pertimbangan dalam keputusannya dan telah mempertimbangkan faktor-faktor yang betul seperti keadaan asal bangunan tersebut, kos penggantian bumbung, nilai peningkatan bangunan tersebut sesudahnya penggantian berbanding dengan masa apabila pajakan bermula, serta nilai pajakan tersebut dalam menentukan pertikaian tersebut secara memihak kepada penyewa.

[3] Perjanjian-perjanjian penyewaan langsung telah disempurnakan oleh KPKK setelah penamatan pajakan di antara KPKK dan Mok. Oleh yang demikian isu mengenai KPKK mendorong penyewa-penyewa kecil Mok untuk memungkiri perjanjian-perjanjian mereka dengan Mok tidak langsung berbangkit.

[4] Penyampaian salinan-salinan notis ke atas penyewa-penyewa kecil oleh KPKK tidak melanggari s. 235 Kanun Tanah Negara 1965 dan tidak menjadi suatu gangguan (campur tangan) yang boleh didakwa.

[Rayuan ditolak dengan kos.]

Case(s) referred to:
Brew Brothers Ltd v. Snax (Ross) Ltd & Another [1970] 1 QB 612 ***(foll)***
Felton & Anor v. Brightwell & Anor [1967] NZLR 276 ***(dist)***
Greig v. Insole [1978] 2 All ER 449 ***(refd)***
Loh Holding Sdn Bhd v. Peglin Development Sdn Bhd & Anor [1984] 2 CLJ 88 ***(refd)***
Post Office v. Aquarius Properties Ltd [1985] 2 EGLR 105 ***(foll)***
Ravenseft Ltd v. Davstone Ltd [1980] 1 QB 12 ***(foll)***
Sleafer v. Lambert Metropolitan [1959] 2 All ER 378 ***(dist)***

Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd [1993] 1 MLJ 113 ***(foll)***

United Asian Bank Ltd v. Tai Soon Heng Construction Sdn Bhd [1993] 2 CLJ 31 ***(foll)***

Civil Appeal No: J-02-791-95

For the appellant - DP Naban (Nitin V Nadkarni & KA Gan with him); M/s Lee Hishamuddin

For the respondent - CV Das (Trevor George De Silva with him); M/s Zaman & Co

Civil Appeal No: J-02-854-95

For the appellant - CV Das (Trevor George De Silva with him); M/s Zaman & Co

For the respondent - DP Naban (Nitin V Nadkarni & KA Gan with him); M/s Lee Hishamuddin

[Appeal from High Court, Johor Bahru; Kod No: 22-357-1993 & Originating Summons No: 24-737-1993]

Reported by Anne Khoo

JUDGMENT

Haidar Mohd Noor JCA:

Two actions were filed at the High Court, Johor Bahru. They are:

(1) Case No. 22-357-1993 – a writ action by Mok Tai Dwan ("Mok") against Kelang Pembena Kereta2 Sdn. Bhd. ("KPKK").

(2) Case No. 24-737-1993 – an originating summons by KPKK against Mok and eight other defendants.

In the writ action against KPKK, Mok prays for the following orders:

(a) an injunction to restrain KPPK from inducing the sub-tenants from breaching their lease agreements with Mok;

(b) an injunction to restrain KPKK from terminating the lease agreement between them;

(c) that the lease agreement between Mok and KPKK is valid;

(d) that KPKK appoint a contractor to change the roof of Block C and repaint Block A, B, C and D;

(d) (i) that the purported termination or forfeiture of the said lease by letter dated 13 September 1993 be declared invalid;

(e) costs; and

(f) other reliefs that the court deems fit.

In the originating summons against Mok and eight other defendants (sub-tenants of Mok), KPKK prays, *inter alia*, for the following orders:

(i) that Mok and all the sub-tenants quit and vacate the property within 24 hours;

(ii) that Mok pay arrears of rental for January to August 1993 amounting to RM739,200;

(iii) that Mok and the sub-tenants pay KPKK mesne profits and/or damages;

(iv) interest at 8% from 25 August 1993 until payment;

(v) costs; and

(vi) any other relief.

Mok filed a counterclaim against KPKK claiming that KPKK wrongfully procured breaches of their sub-tenancies with him as follows:

(a) by communicating directly with his sub-tenants;

(b) by offering his sub-tenants direct tenancy relationship; and

(c) by signing direct tenancy agreements with one or more of his sub-tenants.

Mok counterclaimed for:

(1) damages in the form of loss of rentals;

(2) damages for wrongful forfeiture and cancellation of lease;

(3) damages for breach of agreement;

(4) damages for tort of wrongfully inducing breaches of contract; and

(5) a refund of all expenditure, etc. incurred by him.

Both these actions were heard together with the consent of all the parties.

At the outset of the trial, counsel for KPKK withdrew the proceedings against the third defendant, Bensons Metal Products Sdn. Bhd.

In the course of the trial the parties, by consent,agreed that the issue of liability should be tried first and that the quantum of damages was to be assessed later, depending upon the outcome on the liability issue.

The issues which both parties requested the learned judge to determine at the trial are:

(i) whether, on the facts and on the proper construction to cl. 4(g), (h) and (k) of the lease agreement dated 10 August 1989, the duty to replace the roof was on Mok or on KPKK;

(ii) whether the letter of forfeiture of 13 September 1993 was justified on the facts and under the terms of the lease agreement; and

(iii) whether, on the facts, there was inducement to breach the sub-tenancies by KPKK as the landlord and whether KPKK is liable to Mok for damages under this head.

After hearing the parties, the learned judge made the following orders as per the order by the court dated 22 November 1995 enclosed in the additional appeal record:

(a) KPKK to replace and pay the cost of replacing the roofs to the premises known as No. 64, Jalan Langkasuka, 80350 Johor Bahru erected on the land held under QT(R) 1917, Lot No. TLO 1995 in the Township of Johor Bahru;

(b) KPKK is not liable to Mok for inducing breach of contract of Mok's tenancy agreements with his sub-tenants;

(c) KPKK is not liable to Mok in damages or at all as a result of KPKK inducing the aforesaid breach of contract; and

(d) The issue of whether the letter of forfeiture dated 13 September 1993 issued by KPKK to Mok was justified on the facts of the case and under the terms of the lease agreement dated 10 August 1989 is to be decided after the determination of the quantum of costs of repair of the roof to the aforesaid premises which was incurred by Mok, which is to be tried at a date to be fixed by the court.

KPKK appealed against that part of the judgment of the learned judge wherein he held that it is the duty of KPKK to replace and pay the cost of replacing the roofs of the said premises (Civil Appeal No. J-02-791 of 1995).

Mok, in turn, appealed against that part of the judgment of the learned judge wherein he held that KPKK is not liable to Mok for inducing breach of contract of Mok's tenancy agreements with his sub-tenants (Civil Appeal No. J-02-854 of 1995).

We heard the arguments of the parties on 25 March 1999 in respect of both appeals as agreed, wherein we reserved judgment. We now proceed to give our decision and the grounds thereof.

We do not propose to set out the facts in full as they are sufficiently set out by the learned judge in his judgment. We will refer to the facts in so far as they are relevant to the issues before him.

Civil Appeal No. J-02-791 Of 1995

A lease agreement dated 10 August 1989 ("the said lease") was executed between KPKK and Mok in respect of the lease of industrial land held under QT(R) 1917 Lot No. TLO 1995 in the township of Johor Bahru ("the said land") together with five blocks of building collectively referred to as No. 64, Jalan Langkasuka, 80350 Johor Bahru ("the demised premises"). KPKK granted a lease of the said land for a term of six years commencing 1 October 1989 and terminating on 30 September 1995. It was agreed that the monthly rental for the first 36 months shall be at RM84,000 and thereafter at RM92,000. There was also an option to renew the said lease for another two years.

The demised premises were initially used as a car-assembly plant which ceased operations sometime in 1986 or 1987. The said premises were then left unoccupied until 1989 when the said premises were rented out to Mok. It is not disputed that under cl. 5(e) of the said lease, Mok shall be at liberty to sublease or sublet the said premises. Mok subsequently entered into several sub-tenancy agreements with the second to nine defendants as cited in the originating summons.

Be that as it may, the dispute between KPKK and Mok is centred on the interpretation of cls. 4(g), (h) and (k) of the said lease. It would be useful therefore to reproduce the relevant sub-clauses of cl. 4 of the said lease which read:

> (g) to keep the demised premises in proper sanitary condition and in tenantable repair at all times during the term of this tenancy, fair wear and tear excepted;

(h) to permit the Lessor or his agent with or without workmen at all reasonable times to enter upon and examine the condition of the demised premises and to give the Lessee written notice to effect any reasonable repairs thereto in a proper and workmanlike manner, provided if the Lessee shall fail to comply with such notice within a reasonable time, then the Lessor may effect such repairs in a proper manner and workmanlike manner, and the costs thereof shall become a debt due from the Lessee to the Lessor recoverable forthwith (fair wear and tear excepted);

(k) Nothwithstanding anything herein stated, to repair and maintain the roof, gutter, drainage and sewerage system, walls, floors, paintwork, water tanks, doors, windows and fencing, roadways and yards of the demised premises.

The learned judge was of the opinion that the authorities referred to and considered by him seems to suggest that the correct approach to a dispute of this nature is to ask the following questions:

(i) what was the state of the building on the date the said lease was entered into;

(ii) what is the precise term of the said lease in dispute;

(iii) what is the damage;

(iv) what is the amount of repair required;

(v) whether the disputed works amounts to "repair" or whether it can be considered as giving the landlord a wholly different thing which he demised;

(vi) if the disputed works amounts to a replacement, would it tantamount to restoring the building in a renewed form of a greater value than it was at the commencement of the said lease; and

(vii) what is the cost of the repair.

For a start, we would accept the principle stated by Wilmer LJ in *Sleafer v. Lambert Metropolitan* [1959] 2 All ER 378 at p. 387:

> It is well established that, in the absence of agreement to the contrary, the law imposes no obligation on a landlord to keep the demised premises in repair.

The relevant clause of the said lease that will have to be considered would be sub-cls. 4(g) and (k). Sub-clause 4(g) imposes on Mok as the Lessee to keep the demised premises in tenantable repair at all times during the term of the tenancy, fair wear and tear excepted. Sub-clause 4(k) imposes on Mok, as Lessee, also notwithstanding anything stated therein **to repair and maintain the roofs,** gutter, drainage ... of the demised premises.

KPKK's own witness, Kim Li Wang (DW1) under cross-examination admitted in his report (D31) that he made a visual inspection of the building and found it in a tenantable condition (see p. 97 of the notes of evidence). This would be in line with Mok's evidence that he was not allowed to take his contractors in before signing the said lease. In the event, without making any technical or structural inspection, all parties had thought that the roof was just in a bad condition and could be repaired in the true sense of that term by patching etc. It was on this basis that Mok accepted the demised premises on an "as is" position. Hence Mok was prepared to spend and did spend a sum of RM1 million for repairs and renovations on the demised premises to make it habitable and tenantable.

However, it was only after the constant and repeated complaints from Mok's sub-tenants regarding leaking problem that **structural inspections** were carried out which disclosed that the roof was beyond repair. Alam Jurutera was commissioned by United Motor Works (the parent company of KPKIK) to do a structural inspection of the roof and the report dated 20 July 1990 confirmed that the roof was structurally defective ie, roof trusses were swaying and was beyond repair.

KPKK contended that the roof was in a way damaged or dilapidated caused by chimney removals by Mok. However, it seems clear that the cause of the roof failure was clearly stated as structural defects and excessive corrosion. In any event such an important matter as saying that Mok was responsible for the roof damage, according to the counsel for Mok, should have been specifically pleaded by KPKK and opportunity given to rebut. The issue of the roof being beyond repair and needing replacement was clearly demonstrated by United Motor Works itself replacing the roof on one block of Bensons' factory and Mok replacing the roof in Block C, with each claiming the right of reimbursement from the other. It seems clear to us on the evidence that the cause of the roof failure was due to structural defects and excessive corrosion and not the fault of Mok. Clearly Mok could not possibly envisage this structural defects when he took possession of the demised premises for the reasons stated earlier on.

We now come to next important issue, that is, whether the word "repair" as stated in sub-cl. 4(k) includes "replacement" as contended by KPKK and disagreed to by Mok as being his responsibility.

The learned judge after reviewing the cases of *Sleafer v. Lambert Metropolitan Borough Council* [1959] 3 All ER 378 and *Felton and Anor v. Brightwell & Anor* [1967] NZLR 276 referred to by counsel for KPKK stated at p. 31 of his judgment:

> It is my view that the cases referred to above were decided on facts which differ from the instant case. In the first case, the item in issue was merely the handle or knocker of the front door and in the second case, the item in issue was only the service line supplying the farm with electricity that needed replacement. To me, those items are only subsidiary parts of the demised premises. The facts of both cases show that only repair or part-replacement were required to put both items into good working condition – there was no need to replace the door or the whole electrical system respectively. That being so, I am of the view that the facts in the two cases cited above can be distinguished from the instant case wherein the issue is whether under the terms of the said lease agreement, the duty to 'replace' the roofs as opposed to 'repair' is upon the lessee, ie, Mok. I do not think that one can term the replacement of the whole roof of a building as 'repair'.

In considering the approach to take to dispute of this nature, the learned judge relied on *Brew Brothers Ltd v. Snax (Ross) Ltd and Another* [1970] 1 QB 612 and *Ravenseft Ltd v. Davstone Ltd* [1980] 1 QB 12. In respect of *Brew Brothers Ltd,* Sachs LJ, at p. 640 stated:

> It seems to me that the correct approach is to look at the particular building, to look at the state in which it is in at the date of the lease, to look at the precise terms of the lease, and then come to a conclusion as to whether, on a fair interpretation of those terms in relation to that state, the requisite work can fairly be termed repair. However large the covenant it must not be looked at *in vacuo*.

In *Ravenseft Ltd,* Forbes J, said at p. 21:

> The true test is, as the cases show, that it is always a question of degree whether that which the tenant is being asked to do can properly be described as repair, or whether on the contrary it would involve giving back to the landlord a wholly different thing from that which he demised.
>
> In deciding this question, the proportion which the cost of the disputed work bears to the value or cost of the whole premises, may sometimes be helpful as a guide.

The word "repair" was considered by Hoffmann J in *Post Office v. Aquarius Properties Ltd* [1985] 2 EGLR 105, where at p. 107, he said:

> ... "repair" is an ordinary English word. It also contains a timely warning against attempting to impose crudities of judicial exegesis upon the subtle and often intuitive discriminations of ordinary speech. All words take meaning from the context and it is, of course, necessary to have regard to the language of the particular covenant and the lease as a whole, the commercial relationship between the parties, the state of the premises at the time of the demise and any other surrounding circumstances which may colour the way in which the word is used. In the end, however, the question is whether the ordinary speaker of English would consider the word "repair" as used in the covenant was appropriate to describe the work which has to be done.

Bearing in mind the authorities quoted above, this is what the learned judge answered the questions posed by him (p. 54 of his judgment):

> I think the answers to the first four questions have been answered in the instant case, *viz.*, I have found that the roofs were in a bad condition at the commencement of the lease and that they were beyond repair and need to be replaced. I am also of the view that Mok has not breached his covenant to repair as the replacement of the roof was not within the contemplation of clause 4(g) and (h) of the lease agreement. I am of the view that if it was Mok's responsibility to replace the roofs, it is tantamount to restoring the said premises in a renewed form of a greater value than it was at the commencement of the lease and this finding can be supported by the evidence of DW1, the manager for the properties division of UMW in 1989, who stated in evidence as follows:
>
> > I took Mr. Mok to see the premises. His reaction is that the building needed to be repaired and that the roof need to be replaced or repaired. I did tell him that to repair the premises would mean that the rental would be higher as we have to offset the cost. I can't remember how much higher.
>
> This would seem to suggest that if Mok replaced the roofs at his own cost, it would definitely enhance the value of the said premises as it would be able to attract higher rental and that to me would amount to restoring the said premises in a renewed form of a greater value than it was at the commencement of the lease.
>
> With regard the cost of the disputed works, no evidence was adduced at the trial as to what would be the estimated costs of replacing the roofs. However, at page 193 of volume 1 of the agreed bundle of documents introduced at the trial, a letter from a company called Metro Setia Sdn. Bhd. dated August 10, 1990 which was addressed to Mok as a result of the latter's enquiry, could serve as guide as to the estimated cost of replacing

the roofs – that letter states that the costs to dismantle the existing roofing sheets and to install new roofing sheets for Blocks G1, G2, A, B, F and the canteen would be in the region of RM464,217.50 if colour sheets are used and in the region of RM432,202.50 if non-colour sheets are used. This, to me, is a substantial sum in relation to the lease.

The learned judge went on further to state his finding at p. 58 thus:

> Looking at the proportion which the estimated cost of the disputed work bears to the value of the lease to Mok and the expenditure that he had to bear when he undertook repairs of the said premises at the commencement of the lease, I would think that to insist that Mok is responsible to replace the roofs and bear its cost would go far beyond what any reasonable person would have contemplated under the word "repair". The roofs were beyond repair as stated by the engineer's report and to me the replacement of the roofs cannot be termed "repairs" within the terms of the covenant.

On the fair wear and tear issue the learned judge stated at p. 59 thus:

> I think the evidence is clear that the roofs were beyond repair due to "fair wear and tear" and need to be replaced and that being so, is excepted from Mok's covenant to repair. The engineer's report dated March 5, 1991 confirm that the roofs are in that condition known as "fair wear and tear" when he stated (with regard to Block G.2 of the said premises) that "... the condition of the entire roof of this building was badly rusted and corroded as well. This showed that the surrounding air had a high level of corrosiveness."

After giving due consideration to the submissions of counsel for both parties and the grounds of judgment of the learned judge, we agree that on the facts and on the proper construction to sub-cls. 4(g), (h) and (k) of the said lease, he was correct in finding that the duty to replace and pay the costs of replacing the roofs to the said premises was clearly on KPKK.

In the circumstances the appeal of KPKK is dismissed with costs and the deposit to go towards taxed costs. The order of the learned judge is affirmed.

Civil Appeal No. J-02-854 Of 1995

The issue in this appeal is whether, on the facts, there was inducement by KPKK to the sub-tenants of Mok to breach their sub-tenancies with Mok and whether KPKK is thereby liable to Mok for damages.

The law regarding the tort of inducement to breach of contract is summarised in *Greig v. Insole* [1978] 2 All ER 449 at p. 484 thus:

> At common law it constitutes a tort for a third person deliberately to interfere in the execution of a valid contract which has been concluded between two or more other parties, if five conditions are fulfilled:
>
> First, there must be (a) "direct" interference or (b) "indirect" interference coupled with the use of unlawful means: see per Lord Denning MR in *Torquay Hotel Co. Ltd. v. Cousins* [1969] 2 Ch. 106, at 138.
>
> As to the meaning of "interference" this is not confined to the actual procurement or inducement of a breach of contract: it can cover a case where the third person prevents or hinders one party from performing his contract even though this be not a breach: see per Lord Denning MR.
>
> Secondly, the defendant must be shown to have knowledge of the relevant contract.
>
> Thirdly, he must be shown to have had the intent to interfere with it. Fourthly, in bringing an action, other than a *quia timet* action, the plaintiff must show that he has suffered special damage, that is, more than nominal damage: see *Rookes v. Barnard* [1964] AC 1129, at 1212, per Lord Devlin. In any *quia timet* action, the plaintiff must show the likelihood of damage to him resulting if the act of interference is successful: see *Emerald Construction Company Limited v. Lowthian* [1966] 1 WLR 691, at 703, per Diplock LJ.
>
> Fifthly, so far as it is necessary the plaintiff must successfully rebut any defence based on justification which the defendant may put forward.

Slade J went on further to emphasise one point on the same page thus:

> If these five conditions are fulfilled and the defendant is shown to have had that intention to interfere with the relevant contract which is necessary to constitute the tort, it is quite irrelevant that he may have acted in good faith and without malice or under a mistaken understanding as to his legal rights; good faith, as such, provides no defence whatever to a claim based on this tort: see, for example *South Wales Miners' Federation v. Glamorgan Coal Co. Ltd* [1905] AC 239 per Lord Macnaghten.

The summary laid down in *Greig's* case was considered by the Federal Court in *Loh Holding Sdn. Bhd v. Peglin Development Sdn. Bhd & Anor* [1984] 2 MLJ 105 at p. 108.

Several grounds were relied on by Mok that KPKK induced breaches of contract by dealing directly with Mok's sub-lessees. The relevant clause in the said lease is sub-cl. 5(a) and it reads:

> That the Lessee paying the rent herein reserved and performing all covenants on his part shall peacefully hold and enjoy the demised premises during the term of this Lease (or any renewal thereof) without interruption by the Lessor or any person claiming through under or in trust for him (subject however to clause 4(h) above), or by any other person whosoever and howsoever arising.

It is not disputed that, according to sub-cl. 5(e) of the said lease, Mok shall be at liberty to sub-lease or sub-let the demised premises. Mok subsequently entered into several sub-tenancy agreements with several companies.

No doubt the main dispute between KPKK and Mok relates to whose responsibility it was to repair or replace the roof of the demised premises and this has been dealt with by us earlier on, the issue here is really whether there was evidence, be it documentary or oral, to show that KPKK had induced the sub-tenants of Mok to commit breaches of the sub-tenancy agreements between Mok and his sub-tenants thereby causing loss and damage to Mok as a result thereof.

Direct Tenancy Agreements

There was evidence that KPKK entered into direct tenancy agreements (exhs. P34 A-D) with four of Mok's sub-tenants, namely:

(a) on 5 April 1995 with Superpoly Packaging Sdn. Bhd. (the 4th sub-tenant defendant);

(b) on July, 1994 with Bensons;

(c) Metal Sdn. Bhd. (the former third sub-tenant defendant);

(d) on December, 1994 with Kensia Industries Sdn. Bhd. (the 7th sub-tenant defendant); and

(e) on January, 1995 with I & S Enterprise.

From the dates of the tenancy agreements, it seems clear that the direct tenancy agreements were executed by KPPK after the termination of the main lease. This is borne out by the letter dated 13 September 1993 sent by the solicitors for KPKK to Mok's solicitors. The said lease was subsequently forfeited on 22 September 1993. Hence, the issue of KPKK inducing the sub-tenants of Mok to breach the sub-tenancy agreements with him did not arise.

Secret collateral Agreement With Bensons Metal Products Sdn. Bhd. ("Bensons")

Before the learned judge, Mok's counsel referred to a letter dated 11 August 1989 from Bensons and addressed to KPKK and reproduced in his judgment. Incidentally, Mok's lease with Bensons was also signed on 11 August 1989.

On this issue, this is what the learned judge stated in his judgment (pp. 104 to 106 of the appeal record):

> With regard to the "secret collateral agreement" made between KPKK and Bensons, I am of the view that that agreement, if at all it was one, was too remote under the circumstances to amount to an interference or even a deliberate attempt to interfere with the sub-tenancy agreement entered into between Mok and Bensons. DW4, the general manager of Bensons, explained that Bensons' letter to KPKK dated August 11, 1989 (reproduced earlier) was merely a "safety blanket" in case something went wrong with the main lease between Mok and KPKK. In his evidence, he explained that a sudden end to the main lease will cause Bensons problems in having to look for alternative premises to move their machineries and equipment.
>
> To me that letter merely confirmed an understanding that have been arrived at by both Bensons and KPKK on the eve of the said lease – it was more like a memorandum of understanding rather than an agreement. In relation to this "secret collateral agreement", the evidence also show that KPKK wrote a letter to Bensons on February 9, 1993 which read:
>
> > We regret to have to inform you that the abovenamed Mr. Mok Tai Dwan has, among other things, defaulted in the payment of rent to us since October 1992. An appropriate notice dated 11.1.93 has been served on him requiring him to remedy his default. We wish to refer to our agreed arrangement with you as contained in your letter dated 11.8.89 (a copy of which is enclosed) and would appreciate your letting us know your intention particularly in respect of the paragraph thereof.
>
> To me, the second letter confirms that the alleged agreement was more an understanding between the two parties and that that letter, at most, amounts to an invitation to treat on the part of KPKK – they wanted to know whether Bensons was still interested to continue renting that part of the said premises in the eventuality Mok fail to remedy his default with regard to the payment of rent. It was not a wrongful act and cannot amount to an actionable interference.

We see nothing wrong with the learned judge's finding on this issue.

Service Of Notice By KPKK To Remedy The Breach On The Sub-Tenants Of Mok

KPKK's solicitors by letter dated 23 August 1993 sent a notice to Mok to remedy the breach with regard to the non-payment of rental and copies of the notice were delivered to several of Mok's sub-tenants including Bensons and they acknowledged receipt thereof by signing on KPKK's copy of the notice.

Mok's counsel argued that this action of serving that notice upon the sub-tenants was wrong in law. This is a non-issue really and as rightly put by the learned judge (p. 108 of the appeal record) "I cannot fathom such an argument". The learned judge further on stated:

> DW2 have explained that they did not wait for seven days before serving that notice as they did not want the sub-tenants to be caught unaware. Furthermore, service of such a notice on the sub-tenants also do not seem to contravene section 235 of the National Land Code. Under the circumstances, I am of the view that KPKK's action do not amount to an actionable interference.

We have no reasons to disagree with his finding.

We are satisfied that on the evidence before him, the learned judge had not misdirected himself on the facts and the law applicable thereto. In the circumstances there are no grounds for us to disagree or interfere with his decision (*Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn. Bhd.* [1993] 2 CLJ 31; [1993] 1 MLJ 113; *United Asian Bank Ltd v. Tai Soon Heng Construction Sdn. Bhd* [1993] 1 MLJ 182).

The appeal is therefore dismissed with costs. The deposit to KPKK towards the taxed costs. The order of the learned judge is affirmed. As the costs issue in the High Court is yet to be determined, we would leave this issue to be decided by the High Court (p. 111 of the appeal record). Similarly, in respect of para. (d) of the order of the High Court set out earlier on, as ordered by the learned judge, it is to be tried at a date to be determined by him. We will leave it at that.